IN THE SUPREME COURT OF THE UNITED STATES

WYMAN C. LOWE,

Petitioner for Certiorari

vs.

TAYLOR STEEL PRODUCTS COMPANY, NEW MONARCH MACHINE AND STAMPING COMPANY, and KOLLWOOD, INC., Each a Corporation,

Respondents in Certiorari

MOTION OF PETITIONER, WYMAN C. LOWE, FOR PERMISSION TO FILE A REWRITTEN PETITION FOR WRIT OF CERTIORARI IN SUBSTITUTION FOR AND IN LIEU OF THE PETITION HE FILED JULY 3, 1967

COMES NOW WYMAN C. LOWE, petitioner for a writ of certiorari for review of a decree by the United States Court of Appeals for the Eighth Circuit entered on February 23, 1967 in the case of "Wyman C. Lowe, Appellant v. Taylor Steel Products Company, et al, Appellees", moves to be allowed to file the herewith submitted forty printed copies of his rewritten petition for such writ in substitution for and in lieu of the petition by him therefor filed on July 3, 1967, and respectfully shows as follows:

1. Said decree affirmed a judgment rendered in said case by the United States District Court, Southern District of Iowa,

IN THE SUPREME COURT OF THE UNITED STATES

WYMAN C. LOWE,

Petitioner,

vs.

TAYLOR STEEL FABRICATING COMPANY,
NOW MONARCH MANUFACTURING STAMPING
COMPANY, and JOHN D. TAYLOR,
Each a Corporation,

Respondents.

MOTION OF PETITIONER, WYMAN C. LOWE,
FOR PERMISSION TO FILE A REPLY
PETITION FOR A WRIT OF CERTIORARI IN
SUBSTITUTION FOR AND IN LIEU OF THE
PETITION FILED JULY 3, 1967

Comes now Wyman C. Lowe, petitioner for a writ of certiorari for review of a decree by the United States Court of Appeals for the Eighth Circuit entered on February 23, 1967, in the case of "Wyman C. Lowe, Appellant, v. Taylor Steel Fabricating Company, et al., Appellees", moves to be allowed to file the herewith submitted forty printed copies of his re-written petition for such writ in substitution for and in lieu of the petition by him therefor filed on July 3, 1967, and respectfully shows as follows:

1. Said decree affirmed a judgment rendered in said case by the United States District Court, Southern District of Iowa,

on September 20, 1965, and entered on that date in favor of the defendants, Taylor Steel Products Company, New Monarch Machine and Stamping Company and Kollwood, Inc., each a corporation formed under the laws of the State of Iowa.

2. In that case, the plaintiff, Wyman C. Lowe, sued the defendants for damages and injuries he received on his left foot from a rotary power lawn mower he was operating that he alleged to have been caused by acts of negligence of the defendants in designing, manufacturing, assembling and selling for general public usage said rotary power lawn mower, including failure to warn users of the danger involved in its use and dangers of getting feet under the mower.

3. Petitioner was the runner-up candidate of three candidates for United States Congressman for the Fifth District of Georgia in the September, 1966 Democratic Primary. The winning candidate for said office in that Primary was the incumbent Congressman. He withdrew his candidacy about two weeks after the date of the Primary. Two days later, nomination of a candidate in substitution for him was made by a method other than by voting of electors in a Special Primary. The substituted Democratic nominee lost in the ensuing November election to the Republican nominee for that office.

4. Under the provisions of Chapter 7, Title 2 of the U. S. Code, said Chapter being entitled "Contested Elections", petitioner began a contest of said election to the United States House of Representatives within the required period in December, 1966,

and sought to have it declared invalid mainly on the ground said substitute nomination had not been lawfully made and that applicable law required determination of the substitute nominee by a Special Primary. Between the date said substitute nomination was made and the date of the ensuing November election, petitioner sought by each of two methods to have the substitute nomination set aside and a Special Primary called to fill the vacancy caused by said withdrawal. The final determination of his contest in and to United States House of Representatives, which was adverse to him, was not made until July 11, 1967. The carrying on of the contest by him required much of his time. Being a lawyer, he lost much time from his law practice in 1966 while he was carrying on a campaign as a Congressional candidate. Emergent matters that accumulated in his law practice while he was carrying on said campaign and later the election contest have required much of his time and attention this year.

5. Before the expiration of the ninety day period following February 23, 1967, the date said decree was entered, he submitted to the Clerk of this Court a motion, addressed to the Clerk of this Court a motion, addressed to a Justice of this Court, for an extension of thirty days for filing petition for writ of certiorari for review of said decree. An extension until and including June 24, 1967 was granted. Being unable to complete the petition in desired form within that extension of time he filed another motion before June 24, 1967, addressed to a Justice, for a further extension of twenty-nine days for the purpose stated. An extension of only nine days,

until and including July 3, 1967. was granted as to that motion. As petitioner did not become aware by June 24, 1967 whether or not his said motion for second extension would be granted, he hurriedly prepared and caused to be printed a petition, but not the kind he desired to complete, together with required docketing fee, rushed it by Air Express to Washington, and caused its delivery to be made on June 24. He also caused a copy of the record in the case, certified by the Clerk of the Court of Appeals, to be sent by that Clerk, addressed to the Clerk of this Court, in such time that it was received on June 24, 1967, a Saturday. Petitioner thereby met the time requirement for filing the petition, certified copy of the record and docketing of the appeal. At about the time of the opening of the Clerk's office on Monday morning, June 26, he called the Clerk's office, requested that the petition not be docketed that day as of June 24 in event a Justice granted on that day his said motion, and in such event the forty printed copies of the petition be returned to him. A Justice granted on that day an extension until and including July 3, 1967, which was about one-third of the time he had requested in the motion.

6. He immediately began rewriting the petition and completed it in rewritten form and had all of it printed except a few pages by July 3. He had arranged with a printing office to have the remaining pages printed in time for him to effect delivery of the rewritten petition by Air Express on July 3, 1967. However, pre-holiday personnel conditions on July 3 caused the printing company not to get the remaining pages printed

in sufficient time. Consequently, petitioner arranged and did cause fast delivery of the returned forty printed copies to be made on July 3, 1967. The petition was docketed as of that date.

7. As he had received only part of the extension requested in his motion for second extension, further revised petition, had it printed in the required number of copies in the revised form, sent to the Clerk another motion, addressed to a Justice, before July 24, 1967 in which he asked extension until and including July 24 for the filing of the rewritten petition or granting of an alternative. He sent forty copies of the rewritten petition by Air Express on July 24. His motion was not granted but the Clerk indicated that he might file forty printed copies of a motion for substitution of a rewritten petition in lieu of the petition on file, and submit with them forty printed copies of a rewritten petition. The rewritten petition he had sent was returned to him at his request. He is now submitting such motion for filing, together with forty printed copies of his further re-written petition.

8. An exception and an objection of plaintiff's counsel (Record, pp. 262, 263) to Instruction No. 9 of the Trial Court to the jury (Record, pp.35-37) read:

> 'Plaintiff further excepts and objects to instruction number nine in that it contains an incomplete statement of the Georgia law, as the instruction as given places the duty of avoiding injury upon plaintiff prior to his being aware of the defendants' lack of care * *"

An exception and an objection of plaintiff's counsel (Record, pp.254,255) to the instructions as a whole (Record, pp,28-49) read:

> "Plaintiff further excepts and objects to the instructions given as a whole in that they contain an incomplete and improper statement of Georgia law applicable in this case with respect to the doctrine of comparative negligence, and particularly with respect to the duties placed upon the plaintiff prior to his being able to recover."

Reference is also made to th se parts of plaintiff's argument in his rewritten petition relating to said exceptions and objections, which ecceptions and objections having been included in his "Substituted Statement of Points" in his brief filed in the Court of Appeals.

Parts of said Instruction No. 9 are not in accordance with the following decision of an U. S. Court of Appeals which confirms in effect the two hereinbefore quoted exceptions and objections of plaintiff's counsel to instructions regarding said Georgia law, certiorari as to which decision having been denied by the Supreme Court of the United States:

> Person's failure to exercise ordinary care to escape consequences of another's neg;igence bars recovery for reulting injuries under Georgia statute only where defendant's negligence exists first and is apparent or may be readily known.
>
> Southern Ry. Co.v. Wilbanks, 67 F.2d 424, cert. denied 54 S. Ct. 530, 291 U. S. 678, 78 L. Ed.1066.

Said lack of accordance is a further reason why this motion should be granted.

WHEREFORE, petitioner moves that he be allowed to file his herewith submitted forty printed copies of his rewritten petition in substitution for and in lieu of his petition for writ of certiorari that was filed on July 3, 1967.

Respectfully submitted,

/s/ Charles E. Muskett
CHARLES E. MUSKETT

1024 Carnegie Bldg.
Atlanta, Georgia 30303

Attorney for Petitioner

AFFIDAVIT AS TO SERVICE

COUNTY OF FULTON, GEORGIA

I hereby certify that I did [redacted] Sept.12, 1967 cause delivery to be made by Air Express of a copy of the foregoing motion, except as to what follows in the body of it after paragraph 7, to Lawyer, Lawyer, Ray and Crouch, attorneys of record for said respondents in certiorari, in an envelope addressed to said law firm at its offices, Fleming Bldg., Des Moines, Iowa, the envelope being handed to Mr. James Lawyer of said firm at said address on said date; that I did cause delivery of a copy of the entire foregoing motion containing the changed paragraph 8, said changed paragraph being herein, the copy of the motion being in an envelope addressd to said law firm at said address, to the said office address of said law firm on Sept.14,1967, service thus being made upon said respondents in certiorari.

/s/Wyman C. Lowe
WYMAN C. LOWE
Petitioner and
Movant

Duly sworn and subscribed to before me, this 14th day of Sept., 1967.